



UNITED STATES SENATE
**REPUBLICAN
POLICY COMMITTEE**

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D.C. Snipers Will Not Dissuade the Left

How Soon Will the Constitution Be Construed To Forbid Capital Punishment?

The Washington, D.C., snipers have been caught and jailed. One of them is an adult, and the other is a minor in the eyes of the law. In just three weeks, they murdered ten, seriously wounded three (two of whom are still fighting for their lives), and frightened tens of thousands in Maryland, Virginia, and the District of Columbia. The juvenile may have pulled the trigger in some of those attacks, and he is reported to have been the triggerman in a murder in Alabama. Prosecutors in Maryland and Virginia have begun filing charges, and, for the public, no factor appears as important as the availability of capital penalties.

However, if liberals on the Supreme Court had had their way, the Constitution would now be construed to forbid *every* capital sentence, no matter the age of the criminal or how numerous or despicable the crimes. Justices Brennan, Marshall, and Blackmun held that capital punishment is unconstitutional *per se*, although the Constitution itself sanctions it explicitly in the Fifth and Fourteenth Amendments. Some judges regard themselves as too enlightened to be constrained by the actual words of the Constitution.

And, some judges are disdainful of the views of the men who wrote and ratified the Constitution. The First Congress under the Constitution, which included many founders of the Nation (and which sent the Fifth Amendment to the States for ratification), passed a bill that applied capital penalties to treason, murder, piracy, and forgery. 1 *Statutes at Large* 112 (April 30, 1790). That measure was signed by President George Washington, the same indispensable American who refused to commute the capital sentence of Benedict Arnold's co-conspirator, British Major John André who was hanged as a spy.

While the Left awaits the five justices who will read capital punishment out of the Constitution entirely, it follows a piecemeal strategy. In 1988, the Supreme Court held that persons under the age of 16 may not be subject to capital penalties, *Thompson v. Oklahoma*, 487 U.S. 815, and one year later the Court failed by one vote to apply the same rule to 16-, 17- and 18-year-olds, *Stanford v. Kentucky*, 492 U.S. 361 (1989). In that case, Justices Brennan, Marshall, Blackmun, and Stevens dissented.

Last week, the very week when a 17-year-old was part of a two-man team that was firing bullets into the brains of innocent persons who were merely going about the common tasks of everyday life, Justices Stevens, Souter, Ginsburg, and Breyer said that "offenses committed by juveniles under the age of 18 do not merit the death

penalty. The practice of executing such offenders is a relic of the past and is inconsistent with evolving standards of decency in a civilized society. We should put an end to this shameful practice.” *In re: Kevin Nigel Stanford*, 2002 WL 984217 (decided Oct. 21, 2002) (dissenting from a denial of a writ of habeas corpus).

Currently, 22 States allow murderers between the ages of 16 and 18 to be punished by death. Justices Stevens, Souter, Ginsburg, and Breyer believe that that policy is so uncivilized as to be unconstitutional, and they are prepared to impose their judgment on the people of all 50 States.

Virginia and Alabama are among the 22 States that allow 17-year-olds to be punished by death. They and 20 other States believe that death may be an appropriate penalty for some 17-year-old murderers, and the youthful Washington, D.C. sniper may be an example. Alabama requires that a person over the age of 16 must be charged and tried as an adult if he commits a capital offense. Alabama Statutes §12-15-34-1. In Virginia, a person over the age of 16 may be subject to the death penalty, although his age can be a mitigating factor in his sentencing. Virginia Statutes §19.2-264.2, -264.4.B(v).

In Maryland, no person under the age of 18 can be subjected to a capital penalty. Maryland Criminal Law §2-202(b)(2)(i). Maryland's policy is a public act of a different species than that which is being advanced by Justices Stevens, Souter, Ginsburg, and Breyer, however. No one doubts the authority of Maryland's elected officials to treat juveniles leniently, and no one supposes that Maryland's law will bind another State. The justices, on the other hand, would overturn the considered decisions of many States and preclude differing policies, perhaps forever.

Whether capital penalties are wise or effective or just is a controversial question. Time and again, however, the American people have supported capital punishment. Perhaps they agree with the thinking of Professor Walter Berns, as he began a book on the subject:

“Like most Americans, my business did not require me to think about criminals or more precisely, the punishment of criminals. In a vague way, I was aware that there was some disagreement concerning the purpose of punishment – deterrence, rehabilitation, or retribution – but I had no reason then to decide which was right or to what extent they may all have been right. . . . Then I began to reflect on the work of Simon Wiesenthal, who, from a tiny, one-man office in Vienna, has devoted himself since 1945 exclusively to the task of hunting down the Nazis who survived the war and escaped into the world. Why did he hunt them, and what did he hope to accomplish by finding them? And why did I respect him for devoting his life to this singular task? He says that his conscience forces him ‘to bring the guilty ones to trial.’ And if they are convicted, then what? Punish them, of course. But why? To rehabilitate them? The very idea is absurd. To incapacitate them? But they represent no present danger. To deter others from doing what they did? That is a hope too extravagant to be indulged. The answer – to me and, I suspect, everyone else who agrees that they should be punished – was clear: *to pay them back*. * * *” W. Berns, *FOR CAPITAL PUNISHMENT* 7-8 (1979).

While we recover from the shock of the snipers' attacks, there will be a brief, pragmatic pause in the Left's campaign to rewrite the Constitution, but its effort will resume soon enough. There have been horrific crimes in the past, and they didn't deter the Left. The Left will not be satisfied with policy victories in the States; it wants a high constitutional pronouncement that capital punishment is immoral and everywhere unlawful. How long will it be before the Left prevails, and will we then have more or less true justice and self-government?